APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

BYRON BREASTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A04-0802-PC-113
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0606-PC-2

October 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Byron Breaston appeals the partial denial of his petition for post-conviction relief. The State cross-appeals, arguing the post-conviction court erred by vacating Breaston's habitual offender enhancement. Finding merit in the State's argument, we reverse in part and affirm in part.

FACTS AND PROCEDURAL HISTORY

On December 29, 2003, Breaston was convicted of Class D felony theft and sentenced to two years. Breaston was placed on work release, and on February 1, 2004, he did not return to detention. Breaston was apprehended February 13, 2004 and charged with Class D felony escape[1] and being an habitual offender.[2] On appeal, Breaston argued his sentence was inappropriate, but we affirmed. *Breaston v. State*, 20A03-0503-CR-134 (Ind. Ct. App. Sept. 22, 2005); *see* State's Ex. C (portions of Breaston's brief on direct appeal).

On March 6, 2006, Breaston filed a petition for post-conviction relief. The State did not file an answer. Breaston amended his petition on July 18, 2007, to include a claim that one of the convictions used to support his habitual offender enhancement was not a proper predicate offense.[3] The State filed an answer on August 10, 2007, and filed an amended answer on November 21, 2007. The court held a hearing on Breaston's petition on December 27, 2007. On January 15, 2008, the court granted Breaston partial relief:

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[1] Ind. Code § 35-44-3-5(c).
[2] Ind. Code § 35-50-2-8.
[3] Breaston again amended his petition for post conviction relief on October 17, 2007, to argue that his jury did not include a fair cross-section of the community. It does not appear Breaston pursued this issue at the hearing before the post-conviction court, and he does not raise it on appeal.

> Mr. Breaston correctly points out that . . . one of the underlying predicate offenses used to support his habitual offender enhancement did not meet the statutory requirements. While normally, such an argument must be presented on direct appeal, Mr. Breaston argues that both his trial counsel and appellate counsel provided him ineffective assistance by not raising this issue either at trial or on appeal. As with the State, both Mr. Breaston's trial and appellate [counsel] concede that one of the predicate felonies offered by the State did not support the enhancement, pointing out that the oversight was excusable given the fact that Mr. Breaston had other felony convictions that the State could have offered to justify the enhancement. Without deciding the issue of ineffective assistance of counsel, the Court finds that justice requires that the Court find for Mr. Breaston that his sentence enhancement was inappropriately entered. However, this does not mean that the State cannot retry the enhancement and amend the enhancement to include another felony to support the enhancement. See *Moore v. State*, 769 N.E.2d 1141 (Ind. Ct. App. 2002) . . . .
>
> . . . As to all other arguments presented by Mr. Breaston in his petition for post-conviction relief, the Court finds that they have no merit and accordingly DENIES the petition as to those arguments.

(Appellant's App. at 114-15) (footnote omitted).[4]

DISCUSSION AND DECISION

Breaston bears the burden of proving he is entitled to post-conviction relief. *See Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied*, *cert. denied*. "We will disturb the decision only if the evidence is without conflict and leads only to a

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[4] One of the convictions used to support Breaston's habitual offender enhancement was possession of cocaine. However, a conviction of that crime cannot count as one of the two prior unrelated felonies pursuant to Ind. Code § 35-50-2-8(d)(3):

> (d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:
>
> * * * * *
>
> (3) all of the following apply:
>
> (A) The offense is an offense under IC 16-42-19 or IC 35-48-4 [offenses relating to controlled substances].
>
> (B) The offense is not listed in section 2(b)(4) of this chapter.
>
> (C) The total number of unrelated convictions that the person has for [various drug dealing offenses] does not exceed one (1).

The State did not contest that Breaston's conviction of possession of cocaine fell within this exception.

conclusion contrary to the result of the postconviction court." *Id*. Post-conviction procedures do not afford a petitioner a "super-appeal." *Id*. "If an issue was known and available, but not raised on direct appeal, it is waived." *Id*.

Breaston raises seven issues, which we restate as: (a) whether Breaston received ineffective assistance from trial and appellate counsel; (b) whether the State may amend the habitual offender enhancement; (c) whether the State waived its arguments by not responding to his petition for post-conviction relief within thirty days; (d) whether the trial court erred by denying Breaston's motion for consolidation; (e) whether he failed to return to lawful detention in the meaning of the escape statute; (f) whether his conviction of escape and his loss of credit time based on his failure to return to detention violates Article 1, Section 14 of the Indiana Constitution; and (g) whether Breaston should have been discharged pursuant to Ind. Crim. Rule 4.

The State argues Breaston's issues are not ripe for appeal. On cross-appeal, the State argues the post-conviction court erred by granting Breaston partial relief.

1. Ripeness

Breaston's issues are ripe for appeal. The State argues the post-conviction court's ruling that the State may amend and retry the enhancement is not ripe for review unless and until Breaston is again found to be an habitual offender. The State contends Breaston's remaining arguments are not ripe because "the post-conviction court granted the petition on the habitual offender issue alone and did not determine the other issues." (Appellee's Br. at 7.) We disagree.

The post-conviction court found "justice required" that Breaston's habitual offender enhancement be vacated, and it found this issue dispositive of Breaston's claim of ineffective assistance of counsel. (Appellant's App. at 115.) The post-conviction court found "all other arguments presented by Mr. Breaston" were without merit. (*Id*.) Therefore, the post-conviction court ruled on all issues raised by Breaston's petition and its order is a final, appealable judgment. *See* Ind. Appellate Rule 2(H) (a judgment is final if it disposes of all claims as to all parties).

2. Waiver

We next address Breaston's assertion that the State waived all arguments because it did not respond to his petition for post-conviction relief. Post-Conviction Rule 1(4)(a) provides in relevant part, "Within thirty (30) days after the filing of the petition, or within any further reasonable time the court may fix, the state . . . shall respond by answer stating the reasons, if any, why the relief prayed for should not be granted." When the State does not file an answer to a post-conviction petition, the factual allegations of the petition are deemed admitted. *Sedberry v. State*, 610 N.E.2d 284, 286 (Ind. Ct. App. 1993), *trans. denied*. However, the legal significance of the facts is not admitted. *Id*. Therefore, the State's failure to file an answer does not automatically entitle Breaston to relief. *See id*.

The State did not respond to Breaston's original petition for post-conviction relief. Therefore, it is limited to legal arguments concerning the issues raised in the original petition. Breaston amended his petition on July 18, 2007, raising the new issue of whether his cocaine conviction could be used to support an habitual offender

enhancement. The State timely responded to this new issue and was not barred from presenting evidence on that issue to the post-conviction court.

3. Habitual Offender

The issue of whether Breaston's cocaine conviction was an eligible predicate offense was available on direct appeal, and therefore cannot be raised in a petition for post-conviction relief. *See Timberlake*, 753 N.E.2d at 597 ("If an issue was known and available, but not raised on direct appeal, it is waived.").

To avoid waiver, Breaston argued his counsel was ineffective in that neither trial nor appellate counsel challenged the use of his cocaine conviction as a predicate offense. To establish a violation of the right to counsel, Breaston must show counsel's performance was deficient and prejudiced him. *Zachary v. State*, 888 N.E.2d 343, 346 (Ind. Ct. App. 2008). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id*.

The State argued Breaston was not prejudiced because he had another felony conviction that could support the habitual offender enhancement. The State attached to its amended answer certified copies of judgments of conviction for receiving stolen property, forgery, and theft. Breaston offered no evidence or argument to the contrary. He bore the burden of proof; therefore, he would not have been entitled to relief if the court had considered his ineffective assistance claim.[5] *See Weatherford v. State*, 619

[5] Because we reach this conclusion, we need not address Breaston's argument the State may not amend the habitual offender charge and retry him for that enhancement.

N.E.2d 915, 917-18 (Ind. 1993) (denying post-conviction relief because Weatherford did not demonstrate he was not an habitual offender), *reh'g denied*.

4. Motion for Consolidation

Breaston moved to consolidate his post-conviction case with a civil suit against several public defenders. The decision to consolidate actions is purely discretionary and will be overturned only when a manifest abuse of discretion is established. *Bodem v. Bancroft*, 825 N.E.2d 380, 382 (Ind. Ct. App. 2005). A showing of prejudice is a prerequisite to finding the discretion of the trial court was abused in the grant or denial of a motion to consolidate. *Jessop v. Werner Transp. Co.*, 147 Ind. App. 408, 412, 261 N.E.2d 598, 601 (1970). The post-conviction court gave the following explanation for denying Breaston's motion:

> Mr. Breaston, I'm denying that motion outright; again, for two reasons. One, I don't believe you can consolidate a civil or a PL case into a PCR case; and two, Judge Shewmaker has already dismissed that case subject to any reinstatement that you file.

(Tr. at 8.) This is a reasonable basis for denying Breaston's motion, and Breaston has not argued he was prejudiced by the court's decision. We find no abuse of discretion.

5. Lawful Detention

Breaston was convicted of escape under Ind. Code § 35-44-3-5(c), which provides: "A person who knowingly or intentionally fails to return to lawful detention following temporary leave granted for a specified purpose or limited period commits failure to return to lawful detention, a Class D felony." Breaston argued to the post-conviction court that he was on probation, and therefore did not fail to return to lawful

detention. *See* Ind. Code § 35-41-1-18(b) ("Except as provided in subsection (a)(7) [community corrections] and (a)(8) [electronic monitoring], the term [lawful detention] does not include supervision of a person on probation or parole or constraint incidental to release with or without bail.").

The post-conviction court informed Breaston he was not on probation:

> According to the court's record, and I'm looking at the chronological case summary out of FD-709, Judge Bonfiglio sentenced you to two years in jail with a recommendation for work release. Judge Bonfiglio did not suspend that sentence at that time.

(Tr. at 15.) (*See also* Appellant's App. at 94 (sentencing order)).[6] Accordingly, Breaston's argument fails.

6. Article 1, Section 14

Article 1, Section 14 provides: "No person shall be put in jeopardy twice for the same offense." Breaston argues this provision was violated because when he left work release, he lost credit time and was convicted of escape. Breaston cites decisions without developing a cogent argument as to their application to his case; therefore, the issue is waived. *See Baxter v. State*, 891 N.E.2d 110, 113 n.1 (Ind. Ct. App. 2008).

[6] On appeal, Breaston invokes Article 1, Section 23, which provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Breaston recites the applicable test, but provides no analysis of how it relates to his claim. Nor is it clear that Breaston raised this claim before the post-conviction court. Therefore, his argument is waived. *See Gregory v. State*, 885 N.E.2d 697, 703 n.4, 704 (Ind. Ct. App. 2008) (argument waived when raised for first time on appeal or where party fails to make a cogent argument).

7. Criminal Rule 4

On July 5, 2004, Breaston moved for a speedy trial pursuant to Crim. R. 4(B),[7] which provides:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time.

This issue was available on direct appeal; therefore, to obtain post-conviction relief, Breaston would have to show he received ineffective assistance of counsel. *Timberlake*, 753 N.E.2d at 597. Breaston does not address whether any of the exceptions listed in Crim. R. 4(B) apply. Because Breaston has not shown he should have been discharged, he has not demonstrated he was prejudiced by counsel's failure to raise the issue on direct appeal. Therefore, Breaston's claim fails. *See Zachary*, 888 N.E.2d at 346 (defendant must show counsel's performance prejudiced him).

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[7] In his brief, Breaston asserts he "reinstated his motion for a speedy trial in his Objection to the Respondents [sic] Amended Answer filed with the post-conviction court on December 20th, 2007 (App. 102)." (Appellant's Br. at 10.) Breaston does not explain the legal significance of that motion, nor do we find a reference to Crim. R. 4 in the cited document.

CONCLUSION

Breaston's issues are ripe for appeal. However, the post-conviction court erred by vacating his habitual offender enhancement, and Breaston has failed to demonstrate he is entitled to relief on any of the grounds raised in his appeal. Therefore, we reinstate the enhancement and affirm the post-conviction court's ruling on all other grounds.

Reversed in part and affirmed in part.

VAIDIK, J., and MATHIAS, J., concur.